

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the matter of)	
)	
KSBN Radio, Inc.)	File No. BP-19890501AB, as modified by
Request to Toll the Period to)	File No. BMP-19980605AB
Construct Unbuilt Station DKZTY(AM))	
Winchester, Nevada)	
Facility ID No. 56749)	

MEMORANDUM OPINION AND ORDER

Adopted: September 22, 2004

Released: October 4, 2004

By the Commission:

1. The Commission has before it an Application for Review filed by KSBN Radio, Inc. ("KRI"), former permittee of unbuilt broadcast station KZTY(AM), Winchester, Nevada. KRI seeks review of a staff decision ("Staff Decision") denying both KRI's request to "toll" the KZTY construction period¹ and an associated stay request. The staff also deleted KZTY's call sign from the database. For the reasons set forth below, we grant the Application for Review in part and deny it in part.

I. Background

2. On May 12, 1998, KRI acquired the permit for unbuilt station KZTY(AM) through the assignment process.² KRI submitted a modification application to the Commission on June 5, 1998, proposing to relocate the station to a new site in Clark County, Nevada ("County").³ The staff granted KRI's modification application on February 9, 1999. The permit specifically cautioned KRI that, pursuant to new construction rules becoming effective on February 16, 1999, the permit would automatically expire and be forfeited if construction were not completed prior to August 3, 1999. Subsequently, the Commission authorized the extension of many permits to December 21, 2000 (an additional year counted from the effective date of the *Streamlining MO&O*) and KZTY qualified for that extension.⁴ KRI did not, however, build the facilities specified in the modified KZTY permit which authorized construction of two 285-foot steel towers spaced 398 feet apart by December 21, 2000.

¹ Our rules permit tolling of the normal construction period under certain circumstances. *See* 47 C.F.R. § 73.3598(b).

² *See* File No. BAP-19980202GE. The Commission had authorized the construction of station KZTY(AM) in 1991. The staff extended the station's construction deadline eight times, pursuant to construction rules then in effect. *See* 47 C.F.R. §§ 73.3534(b)(3) (1998) and 73.3535(c) (1998). The Commission substantially changed its construction rules and policies thereafter. *See* 1998 Biennial Regulatory Review – *Streamlining of Mass Media Applications, Rules and Processes*, 13 FCC Rcd 23056 (1998) ("*Streamlining R&O*"), *recon. granted in part and denied in part*, 14 FCC Rcd 17525 (1999) ("*Streamlining MO&O*").

³ The application contained multiple deficiencies which KRI took five months to correct.

⁴ *See* *Streamlining MO&O*, 14 FCC Rcd at 17536.

3. While KRI's application to relocate the station to the new site in Clark County, Nevada, was pending at the Commission, the County adopted a zoning ordinance effectively preventing construction of such facilities.⁵ The ordinance required towers to be spaced at least 600 feet apart instead of the 398-foot spacing authorized in the construction permit, and required any tower above 80 feet in height to accommodate at least three antennas.⁶ KRI did not contemporaneously notify the Commission of the ordinance, and proceeded to construct, without prior Commission approval, unconventional facilities that were acceptable to the County under a negotiated exception to the ordinance. The constructed facilities consist of two 114-foot fiberglass whip antennas ("Whip Antenna System"). The constructed facilities do not conform to the facilities authorized in the construction permit. Further, whip antennas in AM directional tower arrays have not been sufficiently tested to demonstrate whether they have the characteristics of conventional steel towers. Their ability to perform on par with traditional AM facilities is unproven.

4. On August 19, 1999, KRI applied for a license to cover its unconventional and unauthorized facilities. In response to Question II(4) of the application, which asks whether all terms of the construction permit have been met, KRI answered "no." In response to Question III(9), requiring description of the antenna system, KRI disclosed that it had built fiberglass whip antennas, 34.75 meters in height. KRI also explained in the license application that it was not currently operating pursuant to automatic program test authority because such authority is not available for AM directional stations. In a November 9, 1999, supplement to the license application, KRI first disclosed the local ordinance and explained its efforts to obtain an exception to the ordinance's requirements. Specifically, KRI stated that to successfully negotiate with the County for an exception to the ordinance's requirements concerning 600-foot spacing and accommodation of three antennas, KRI agreed to reduce the 285-foot towers specified in the KRI construction permit. KRI notes that even the much lower 114-foot height of the Whip Antenna System was "barely acceptable to the County."⁷ KRI argued that although the Whip Antenna System "is not a perfect compromise," that system would provide "a more than acceptable signal."⁸

5. The staff dismissed the application as patently defective on November 22, 1999.⁹ KRI filed a petition for reconsideration arguing that the whip antennas could perform in a manner electrically identical to the towers authorized in its permit and were therefore permissible substitutions. The staff provided KRI substantial time to submit evidence in support of that argument, such as data from the manufacturer to demonstrate the Whip Antenna System's efficiencies, performance, and ability to comply with Commission rules and standards. Ultimately, in the absence of evidence to substantiate KRI's claims, the staff denied the petition for reconsideration on December 21, 2000.¹⁰

6. KRI pursued two different options shortly before its permit was to expire, while its petition for

⁵ Pursuant to 47 C.F.R. § 1.65(a), KRI should have reported such a change in circumstances to the Commission.

⁶ See *Declaration of Fred Weinberg* (dated Dec. 20, 2000), attached to KRI's Petition for Reconsideration. A similar but undated statement from Mr. Weinberg was first submitted on November 9, 1999, as a supplement to KRI's defective license application (File No. BL-990819DD).

⁷ *Supplement to File No. BL-990819DD* at 2.

⁸ *Id.*

⁹ *Letter to Peter Gutmann, Esq.*, Ref. 1800B3-JBS (MMB Nov. 22, 1999).

¹⁰ *Letter to Peter Gutmann, Esq.*, Ref. 1800B3-CNM (MMB Dec. 21, 2000). The staff specifically denied as a bare, unsupported assertion, KRI's claim that the Whip Antenna System was an "identical" "replacement" tower permitted under Commission rules. *Id.* at 2 (distinguishing 47 C.F.R. § 73.1690(b)(1) which provides that a permit is required to construct new towers, except for replacement of an existing tower with one of identical height and coordinates).

reconsideration concerning the Whip Antenna System remained pending. On October 6, 2000, KRI applied to co-locate KZTY's transmitting antenna with the facilities of an existing station in Laughlin, Nevada. The staff dismissed that application as unacceptable on November 8, 2000, due to multiple technical deficiencies.¹¹ On November 20, 2000, just one month prior to the permit's expiration date, KRI sued the County in the U.S. District Court for the District of Nevada, arguing that the court should overturn the zoning ordinance because it usurps the Commission's sole jurisdiction to establish engineering requirements for radio stations.¹² On November 21, 2000, KRI filed a letter requesting that the Commission's staff toll the permit's December 21, 2000, expiration date.¹³ KRI's tolling request was based entirely on the zoning litigation as an encumbrance on construction. The staff, while recognizing that zoning litigation can be a basis for tolling,¹⁴ determined on December 4, 2000, that KZTY did not qualify for tolling.¹⁵ The staff stated that the rules provide for three years to construct broadcast stations and permit tolling of a particular station's construction period only when there have been fewer than three unencumbered years to construct.¹⁶ Although KRI had only held the permit for 18 months, the permit had previously been extended multiple times since its issuance in 1991.¹⁷ Hence, over nine years had elapsed prior to the zoning litigation and KRI made no attempt to show that fewer than three of those years had been unencumbered.

7. On December 20, 2000, KRI sought reconsideration of the tolling denial and filed a separate motion to stay the permit's impending expiration. KRI argued that tolling treatment is appropriate without regard to the amount of time a permit has been unencumbered when zoning litigation is ongoing. It based this argument on an unpublished April 10, 2000, staff decision issued for station WLAW(FM), North Dartmouth, Massachusetts ("*WLAW Letter*").¹⁸ It also claimed for the first time that the permit was encumbered by "administrative review," based on KRI's December 29, 1999, request for reconsideration of the staff's denial of a license for the Whip Antenna System. Alternatively, KRI argued for the first time that it qualified for a waiver of the tolling provisions. The staff denied KRI's reconsideration and stay requests on April 9, 2001.¹⁹ On review, KRI argues that denial of tolling is contrary to the precedent established by the *WLAW Letter*.²⁰ KRI also contends that the staff made erroneous findings.²¹

¹¹ For example, the proposed Laughlin facility failed to provide any nighttime coverage to Winchester, the station's community of license. *Letter to Peter Gutmann, Esq.*, Ref. 1800B3-JBS (MMB Nov. 8, 2000).

¹² *Far West Inc. v. Clark County*, Docket No. CV-S-00-1392-PMP (D. Nev. filed Nov. 20, 2000). KRI is a party to the litigation, in which the lead plaintiff is a company with an option to acquire station KZTY. With respect to conflicts between local and federal interests, the Commission has authority to preempt local zoning law when necessary to achieve federal communications objectives. *See City of New York v. FCC*, 486 U.S. 57, 63 (1988). At the same time, the Commission recognizes the legitimate interests of local governments in safety and aesthetic issues concerning tower placement and will not unduly interfere in such matters. *See Preemption of State and Local Zoning and Land Use Restrictions, Notice of Proposed Rulemaking*, 12 FCC Rcd 12504 (1997).

¹³ *Letter from Peter Gutmann, Esq.* (Nov. 21, 2000).

¹⁴ The relevant rule recognizes as encumbrances matters "pending before any court of competent jurisdiction relating to any necessary local, state or federal requirement for the construction or operation of the station, including any zoning or environmental requirement." 47 C.F.R. § 73.3598(b)(ii).

¹⁵ *Letter to Peter Gutmann, Esq.*, Ref. 1800B3-GDG (MMB Dec. 4, 2000).

¹⁶ *See* 47 C.F.R. §§ 73.3598(a) and (b).

¹⁷ *See supra* note 2.

¹⁸ *Letter to Russell C. Powell, Esq.*, Re: WLAW(AM) (MMB Apr. 10, 2000).

¹⁹ *Letter to Peter Gutmann, Esq.*, Ref. 1800B3-IB (MMB Apr. 9, 2001). *See* 47 C.F.R. §§ 1.106(c) and (d) (setting forth standards applicable to petitions for reconsideration, including the limitation on raising new facts).

²⁰ *See* 47 C.F.R. § 1.115(b)(2)(i).

²¹ *See id.* § 1.115(b)(2)(iv).

Specifically, KRI contests staff statements that KRI constructed substandard facilities and raised new matters on reconsideration that it could have raised earlier. Finally, KRI argues that the staff did not provide an adequate basis for denying the stay request.

II. Discussion

8. Three Year Construction Period/Consistency with Precedent. The staff's denial of tolling in the instant case was based on the Commission's November 25, 1998, *Streamlining R&O* which gave permittees the opportunity to demonstrate that their permits had not yet been outstanding for three unencumbered years, and that they therefore qualified for additional time through tolling.²² The staff relied on the Commission's statement that "[n]o additional time will be granted when the permittee has had, in all, at least three unencumbered years to construct."²³ The KZTY(AM) permit had been in effect more than nine years,²⁴ and as noted above, KRI did not attempt to demonstrate that fewer than three of those years were unencumbered.²⁵

9. The staff correctly observed that, in virtually all instances, permittees are ineligible for tolling treatment if they have already received three unencumbered years to construct. Specifically, tolling treatment "stops the clock" only with respect to the permittee's original three-year construction period, so a permittee is ordinarily ineligible for tolling if the original three-year period has already run.²⁶ The staff failed to take into account, however, that the Commission provided one, extremely limited exception to this generally applicable principle of tolling. The exception was applicable to permittees that qualified for the "bonus year," *i.e.*, the additional year from December 20, 1999 to December 21, 2000. With respect to the bonus year, the Commission stated that "concerning the additional time hereby granted, permittees may employ the tolling provisions [of Section 73.3598(b)]"²⁷

10. We find that the case before us involves a permittee within that narrow bonus year/tolling

²² *Streamlining R&O*, 13 FCC Rcd at 23090 ("[W]e will only count against a permittee's three-year construction allowance those periods in which the permit was 'unencumbered' by an administrative or judicial review or by an act of God") and at 23092-93 ("a permittee may submit a showing requesting additional time based on the tolling procedures adopted herein").

²³ *Id.* at 23092-93.

²⁴ See *supra* note 2.

²⁵ KRI concedes that the station's former permittees "spent so much time but with so few results." Petition for Reconsideration at 3. KRI states on review that it obtained the permit through assignment in 1998, and held the permit fewer than three years when it expired in 2000. The amount of time KRI held the permit is not determinative because a station's three-year construction period begins upon issuance of the original permit, in this case 1991, and is not extended following changes in ownership. See *Birach Broadcasting Corp.*, 18 FCC Rcd 1414 (2003) (an assignee that acquired an unencumbered permit one day before expiration did not qualify for tolling; a petition for reconsideration filed Mar. 3, 2003 is pending). See also *Streamlining R&O*, 13 FCC Rcd at 23090, revising 47 C.F.R. § 73.3598, and deleting 47 C.F.R. § 73.3535(c) (1998).

²⁶ See *supra* note 22. See also *Streamlining MO&O*, 14 FCC Rcd at 17537 ("we adopted a system by which the three-year construction period will be tolled . . ."). For permits granted after adoption of the *Streamlining R&O*, it would be unusual for a permit to span more than three years because the Commission will waive the three-year construction period only in rare and exceptional circumstances beyond the permittee's control. Older permits like the one at issue here, however, more frequently had lengthy life spans because such permits were extended for broader reasons under previous rules.

²⁷ *Streamlining MO&O*, 14 FCC Rcd at 17536. The Commission adopted this exception because it wanted to give one final opportunity to permittees who may have invested significant time and money constructing facilities.

class.²⁸ KRI was eligible to receive the bonus year and experienced a qualified tolling event during that year. Specifically, beginning November 20, 2000, KRI became a party to an “action pending before any court of competent jurisdiction relating to any necessary local, state or federal requirement for the construction or operation of the station, including any zoning or environmental requirement.”²⁹ We find that KRI’s permit was tolled on November 20, 2000. Upon resolution of the court case, the permit would begin to run again for the 30 days remaining in KRI’s bonus year and then expire automatically.³⁰ Having made that determination under the Commission’s bonus year/tolling exception, we need not address KRI’s tolling arguments regarding the staff’s *WLAW Letter*.³¹

11. In accordance with Section 73.3598(d) of our rules, however, KRI was required to notify the Commission promptly upon resolution of the relevant court case.³² On March 10, 2004, staff telephoned the court clerk’s office to inquire about the case status. Commission staff was informed that the case on which KRI based its tolling request had terminated on August 2, 2001, pursuant to a stipulation of dismissal by the parties. KRI never notified the Commission of resolution of the case. Pursuant to the tolling rules, the 30 days remaining in KRI’s bonus year began to run again on that date. The permit thus would have been valid through September 1, 2001, 30 days after the court’s dismissal, and expired automatically at 12:01 a.m. on September 2, 2001.³³

12. Waiver Request/Unauthorized Construction. KRI also argues on review that it qualified for additional time in the form of a waiver of the three-year construction period.³⁴ KRI did not request a waiver nor raise many of the matters that it states support a waiver until the reconsideration stage of this proceeding. Those matters could have been properly raised at the initial stage of the proceeding.³⁵ Accordingly, we deny the waiver request on this procedural ground.

13. Moreover, to justify a waiver of the construction rule, a permittee must demonstrate that “rare and exceptional circumstances” beyond its control prevented timely construction.³⁶ KRI has shown no such circumstances. KRI had uninterrupted Commission authorization to construct in accordance with

²⁸ In other cases in which the Commission applied the general concept that there is no tolling beyond the initial three-year period, the permittee was not a member of the limited class described above. For example, in *Wendell & Associates*, the permittee had already received over three unencumbered years and based its tolling request on events occurring in September 2001, after termination of the bonus year. *Wendell & Associates*, 17 FCC Rcd 18576 (2002). See also *Texas Grace Communications*, 16 FCC Rcd 19167 (2001) (permit that expired later than the December 20, 2000, end of the “bonus year”, was ineligible for tolling when permittee had received over three unencumbered years from grant of its initial permit).

²⁹ 47 C.F.R. § 73.3598(b)(ii).

³⁰ 47 U.S.C. § 319(b).

³¹ The *WLAW Letter*, an unpublished staff decision without precedential value, does not in any event grant relief exceeding that given to KRI in the instant decision -- a December 21, 2000 expiration date which could be extended if pending litigation was not resolved by that date. See 47 C.F.R. § 0.445(e). Further, KRI was not a party to the proceeding at issue in the *WLAW Letter*, nor did KRI cite the *WLAW Letter* in its initial tolling request.

³² 47 C.F.R. § 73.3598(d).

³³ Accordingly, deletion of the call sign KZTY(AM) from the Commission’s database was proper, as of 12:01 a.m. September 2, 2001.

³⁴ See *Wendell & Associates*, 17 FCC Rcd at 18579-80 (2002). See generally *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), cert. denied 409 U.S. 1027 (1972).

³⁵ See 47 C.F.R. § 1.106(c). As indicated above, KRI initially requested tolling, not a waiver, based on KRI’s lawsuit against the County.

³⁶ *Texas Grace Communications*, 16 FCC Rcd at 19171 (citing *Streamlining MO&O*, 14 FCC Rcd at 17541). See also 47 C.F.R. § 1.3 (Commission will not waive the rules absent a showing of good cause).

the terms of the permit.³⁷ KRI's inability to build within the time allotted was due largely to its own poor choices.³⁸ When KRI learned in early 1999 of a troublesome local zoning ordinance, it did not try to resolve the problem in a manner consistent with Commission requirements. For example, it did not immediately seek a zoning variance consistent with its permit, challenge the ordinance in court, or seek Commission authority to move to a site unaffected by the ordinance. Such actions, if successful, might have enabled KRI to build facilities permitted by the Commission. KRI chose instead to construct the unconventional and unauthorized Whip Antenna System. We reject KRI's suggestion that its unauthorized construction was a timely and good faith effort to build. KRI's construction violated the Communications Act and the Commission's rules.³⁹ Nor do KRI's actions following its unauthorized construction form the basis for a waiver.⁴⁰ On October 6, 2000 (two months before expiration of the permit), KRI filed a technically deficient application to propose a different site. This last-minute effort is illustrative of "the sort of nonfeasance that the new construction requirements are designed to eliminate."⁴¹ In sum, we find that the circumstances preventing KRI's timely construction of KZTY were neither rare and exceptional nor beyond KRI's control. We therefore affirm the staff's denial of the waiver request.

14. Stay Request. Finally, we consider KRI's brief argument concerning its request for a stay. At the outset, we note that KRI premised its stay request on the belief that its petition for reconsideration, filed only one day prior to permit expiration, would be found meritorious. KRI sought to prevent the permit from expiring and being automatically forfeited before the staff acted on its petition. Our decision herein that KRI's construction permit, as tolled, has long since expired essentially moots the stay request.

15. We also find on review that the request would have failed the four-pronged test for grant of a stay. A party requesting a stay must demonstrate the following: (1) likely success on the merits; (2) irreparable harm absent a stay; (3) lack of harm to other parties; and (4) furtherance of the public interest.⁴² Regarding KRI's first argument, that it would likely succeed on reconsideration, although we have reached a different conclusion from the staff on the issue of tolling, that does not alter our ultimate conclusion that KRI's construction permit has expired. KRI's second argument, that it will suffer irreparable harm, is premised on KRI's inability upon permit cancellation to recoup its costs for obtaining the permit and purchasing the Whip Antenna System. We consider any such harm as a natural consequence of KRI's failure to construct as authorized prior to permit expiration. With respect to the third prong, KRI argues that this case is uncontested and that there are thus no other parties that could be harmed by a stay. We acknowledge the uncontested status of this case. Nevertheless, we observe that

³⁷ Contrary to KRI's argument, the permit was not encumbered by "administrative review." For tolling-related purposes, our rules define administrative review as consideration of "petitions for reconsideration and applications for review of the grant of a construction permit." 47 C.F.R. § 73.3598(b)(ii). KRI alleges something quite different: a petition for reconsideration of the *denial* of its application to *license* the unauthorized Whip Antenna System. See *Texas Grace Communications*, 16 FCC Rcd at 19173 (staff consideration of permittee's own petition for reconsideration of a denial of tolling not considered administrative review such that the permit is tolled).

³⁸ See *Wendell & Associates*, 17 FCC Rcd at 18580 (2002) (denial of waiver based on delays following poor planning).

³⁹ See 47 U.S.C. §§ 301 and 319(c); 47 C.F.R. § 73.33(b). We will not impose a forfeiture for KRI's unauthorized construction in 1999 because when, as here, the violation involves a station not yet licensed, no forfeiture penalty can be imposed if the violation occurred more than one year prior to issuance of the Notice of Apparent Liability. See 47 C.F.R. § 1.80(c).

⁴⁰ KRI's argument was originally based, in part, on its November 20, 2000, court case. As we have already granted tolling treatment for the court case, that matter could not provide a basis for any additional time through waiver.

⁴¹ See *Birach Broadcasting Corp.*, 18 FCC Rcd 1414 (2003), *petition for recon. pending*.

⁴² See *Virginia Petroleum Jobbers Ass'n v. FCC*, 259 F.2d 921 (D.C. Cir. 1958), *modified*, *Washington Metropolitan Transit Authority v. Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977).

KZTY has “warehoused” spectrum for nine years and that any stay would prolong the inability of other applicants to use this spectrum. Finally, with respect to the fourth prong, KRI argues that it stands ready to provide service to the public, as demonstrated by its construction of the Whip Antenna System. We disagree. The public interest is not served by the construction and operation of unproven facilities that do not conform to Commission requirements.

16. KRI’s permit was automatically forfeited on September 2, 2001, for failure to construct and file a license application for the authorized facilities.⁴³ As a result, other parties will have an opportunity to use the spectrum to improve (through minor modifications) existing stations operating in accordance with our engineering requirements. Any unused spectrum will eventually become available for major facilities changes or new AM stations during a future AM application filing window. In view of the considerable time that we have already provided for the construction of station KZTY, with no resulting service to the public, termination of the KRI permit best serves the public interest.

III. Ordering Clause

17. Accordingly, IT IS ORDERED, that the Application for Review filed by KSBN Radio, Inc. IS GRANTED to the extent indicated herein and DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁴³ See 47 C.F.R. § 73.3598(e).